

68437-0

65437-0

No. 68437-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DVONTAVEOUS NAAUN HOSTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Harry J. McCarthy

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 700
Seattle, Washington 98101
(206) 587-2711

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 FEB -4 PM 4:53

TABLE OF CONTENTS

A. ARGUMENT..... 1

UNDER THE UNITED STATES *AND* WASHINGTON
CONSTITUTIONS, THE SEIZURE OF MR. HOSTON
WAS UNLAWFUL 1

B. CONCLUSION..... 4

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 1, 2, 3

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 7 1, 3

FEDERAL CASES

Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254
(2000)..... 3

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)..... 1, 2

WASHINGTON CASES

State v. Franklin, 41 Wn.App. 409, 704 P.2d 666 (1985)..... 2

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009) 1

State v. Hart, 66 Wn.App. 1, 830 P.2d 696 (1992) 1

State v. Randall, 73 Wn.App. 225, 868 P.2d 207 (1994)..... 2

State v. Sieler, 95 Wn.2d 43, 621 P.2d 1272 (1980) 2

State v. Vandover, 63 Wn.App. 754, 822 P.2d 784, *review denied*, 120
Wn.2d 1018 (1992)..... 3

A. ARGUMENT

UNDER THE UNITED STATES *AND* WASHINGTON
CONSTITUTIONS, THE SEIZURE OF MR. HOSTON
WAS UNLAWFUL

The fundamental flaw in the State's Response brief is conflating the test for determining whether the seizure of an individual is lawful under the Washington and United States Constitutions. Under the federal constitution, a *Terry* stop may be based upon reasonable suspicion, supported by objective facts, that an individual is involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Washington Constitution exception is more narrowly construed than under the Fourth Amendment, requiring the State bear the burden of proving the legality of a warrantless seizure by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). Thus, under article I, section 7, the State establishes an informant's tip's reliability for an investigatory stop only when "(1) the *informant* is reliable *and* (2) the informant's *tip* contains enough objective facts to justify the pursuit and detention of the suspect *or* the noninnocuous details of the tip have been corroborated by the police thus suggesting that the information was obtained in a reliable fashion." *State v. Hart*, 66 Wn.App. 1, 7, 830 P.2d 696 (1992). As a

consequence, where the officer has no information regarding the informant, the officer must either have some corroborative observation which suggests the presence of criminal activity or some verification that the police obtained the informer's information in a reliable fashion. *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980).

Initially, it is important to correct the State's erroneous view of the record. Here the police never identified the three informants who contacted the police. The officers obtained no identifying information, thus the informants remained anonymous. Further, the officers were informed that a young man matching Mr. Hoston's description was in possession of a firearm. Contrary to the State's assertion, there was no information, either from the informants or the officers' independent observations, that Mr. Hoston was the individual seen waiving a firearm. Finally, possession of a firearm is not a crime.

The State's reliance on the decisions in *State v. Randall*, 73 Wn.App. 225, 868 P.2d 207 (1994), and *State v. Franklin*, 41 Wn.App. 409, 704 P.2d 666 (1985), underscores the flaw in the its argument. Both cases rely solely on the Fourth Amendment and do not discuss the *Terry* standard under the Washington Constitution. But even assuming that the "totality of the circumstances" in the test under the Fourth

Amendment, “the basis for the informant's knowledge is vital in establishing the reliability of the tip on which the reasonableness of the investigatory stop depends.” *State v. Vandover*, 63 Wn.App. 754, 759, 822 P.2d 784, *review denied*, 120 Wn.2d 1018 (1992). Further, contrary to the State’s claim here, “*Franklin* does not stand for the proposition that potential danger to the public is a substitute for a reliable informant.” *Id.* at 760.

But, as noted in the Brief of Appellant, even under the Fourth Amendment the stop here was illegal. In *Florida v. J.L.*, 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), the Court unequivocally held that an anonymous tip that a particular person is carrying a gun is insufficient to justify a police officer’s stop of that person. *Id.* at 268. But that is exactly what happened in Mr. Hoston’s case. The informants here who allegedly observed a young black man with a gun were *anonymous*; the officers failed to obtain *any* information about the informants’ identity.

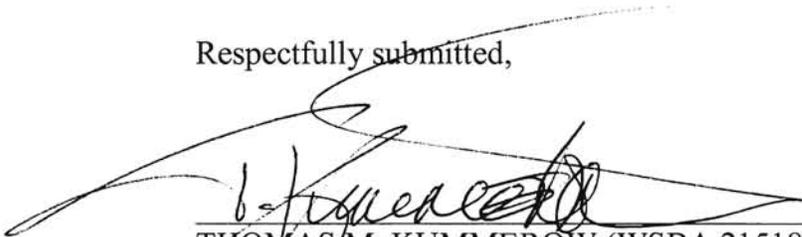
In sum, under both the Fourth Amendment and article I, section 7, the seizure of Mr. Hoston and the firearm from his waistband was unconstitutional. The Court should reverse and remand with instructions to suppress the gun as a result of the improper stop.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant and the instant reply brief, Mr. Hoston requests this Court reverse the trial court's denial of the motion to suppress evidence, and order the firearm suppressed.

DATED this 4th day of February 2013.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68437-0-I
v.)	
)	
DVONTAVEOUS HOSTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF FEBRUARY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> PATRICK HINDS, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(<input checked="" type="checkbox"/>) (<input type="checkbox"/>) (<input type="checkbox"/>)	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DVONTAVEOUS HOSTON BA: 212028763 KING COUNTY JAIL-KENT 620 W JAMES KENT, WA 98032	(<input checked="" type="checkbox"/>) (<input type="checkbox"/>) (<input type="checkbox"/>)	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF FEBRUARY, 2013.

X _____ 

**FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 FEB -4 PM 4:53**

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710